

1 **LEWIS BRISBOIS BISGAARD & SMITH LLP**
JONATHAN S. PINK, SB# 179685
2 E-Mail: Jonathan.Pink@lewisbrisbois.com
JON E. HOKANSON, SB# 118829
3 E-Mail: Jon.Hokanson@lewisbrisbois.com
THOMAS S. KIDDE, SB# 61717
4 E-Mail: Thomas.Kidde@lewisbrisbois.com
TRAVIS LI, SB# 298208
5 E-mail: Travis.Li@lewisbrisbois.com
633 West 5th Street, Suite 4000
6 Los Angeles, California 90071
7 Telephone: 213.250.1800
Facsimile: 213.250.7900

8 Attorneys for Plaintiff
HYPERICE, INC. a California
9 Corporation

10 UNITED STATES DISTRICT COURT
11 CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION
12

13 HYPERICE, INC., a California
Corporation,

14 Plaintiff,

15 vs.

16 LONGEVITY FITNESS, INC., a New
17 York Corporation; and SUE
HITZMANN, an Individual,

18 Defendants.
19

CASE NO.

**COMPLAINT FOR
DECLARATORY JUDGMENT**

Trial Date: None Set

20 Plaintiff Hyperice, Inc., (“Hyperice”), by and through its attorneys, for its
21 complaint for declaratory judgment against Defendant Longevity Fitness, Inc.
22 (“LF”), alleges the following:

23 **I. NATURE OF THE ACTION**

24 1. In this action, brought pursuant to 28 U.S.C. § 2201 *et seq.*, Hyperice
25 seeks a declaratory judgment that the patent allegedly owned by Defendant LF is not
26 infringed and is invalid under the patent laws of the United States, Title 35 of the
27 United States Code. This Court has subject matter jurisdiction pursuant to 28 U.S.C.
28 §§ 1331, 1338 and 2201 with respect to an actual controversy arising under Title 35

1 of the United States Code.

2 2. LF claims rights under U.S. Patent No. 8,337,437 (the “‘437 Patent” or
3 "Patent-In-Suit") and has asserted, or threatened to assert, those rights against
4 Hyperice based on a product Hyperice has offered for sale (the “Vyper Product”) in
5 the United States. A true and correct copy of the ‘437 Patent is attached hereto as
6 Exhibit A.

7 3. Based on LF’s assertions, Hyperice seeks a declaration that the Vyper
8 Product does not infringe the ‘437 patent and/or that one or more claims of the ‘437
9 patent is invalid.

10 II. THE PARTIES

11 4. Hyperice is a corporation organized under the laws of the state of
12 California, with its principal place of business at 15440 Laguna Canyon Road, Suite
13 230, Irvine, California, 92618.

14 5. Defendant LF is a corporation organized under the laws of the state of
15 New York, with its principal place of business at 70 West 71st Street 4e, New York,
16 New York 10023.

17 6. On information and belief, Sue Hitzmann (“Hitzmann”) is the founder
18 and majority shareholder of defendant LF.

19 7. As set forth in Exhibit A, the ‘437 patent issued to Hitzmann. On
20 information and belief Hitzmann subsequently assigned the ‘437 Patent to defendant
21 LF.

22 III. JURISDICTION AND VENUE

23 8. This action arises under the Federal Declaratory Judgments Act, 28
24 U.S.C. §§ 2201 and 2202 and the Patent Laws of the United States, Title 35 of the
25 United States Code.

26 9. This Court has subject matter jurisdiction over this action pursuant to
27 28 U.S.C. §§ 1331 and 1338(a).

28 10. On information and belief, LF is subject to the Court’s specific and

1 general personal jurisdiction, pursuant to due process and/or the California long arm
2 statute, due to, at the very least, the following activities:

3 (a) LF operates a website, <http://www.meltmethod.com>, through
4 which it: (i) sells products to consumers in the Central District of
5 California, including the “MELT Soft Body Roller,” product;
6 (ii) advertises its MELT Method® fitness and longevity training classes
7 at physical sites located within this District; and (iii) advertises
8 upcoming LF-owned and sponsored MELT events scheduled to take
9 place in Southern California, including one billed as “Take the first step
10 to becoming a MELT Instructor with Sue [Hitzmann] in San Diego!”;
11 and,

12 (b) LF operates and/or licenses its MELT Method® fitness and
13 longevity training at more than a dozen facilities within this District
14 including sites in Glendale, Pasadena, Long Beach, Tustin, Irvine and
15 Newport Beach, to name a few. (See printout of relevant pages from
16 <http://www.meltmethod.com>, a true and correct copy of which is
17 attached as Exhibit B.)

18 11. Hyperice is informed and believes, and thereon alleges, that through the
19 aforementioned activities, LF has obtained substantial benefits and revenue from its
20 activities within this District, and that LF is subject to the Court’s general
21 jurisdiction, as a result of its own actions, or the actions of its agents or licensees,
22 and/or from having derived substantial revenue from goods and services provided to
23 persons or entities in the Central District of California.

24 12. Venue is proper in this District under 28 U.S.C. §§ 1391(b) and (c)
25 because a substantial part of the events giving rise to Hyperice’s claims occurred in
26 this District and the defendant is subject to personal jurisdiction in this District.

27 IV. FACTUAL BACKGROUND

28 13. Beginning in 2010, Hyperice set out to create the world's first high

1 performance, portable ice compression device. After years of testing on some of the
2 world's best athletes, Hyperice made its product line available to the general public
3 in 2012.

4 14. Hyperice's products combine innovative design and cutting edge
5 engineering to enhance athletic performance, and help athletes recover from certain
6 injuries. One such product is the Vyper Product. It is a fitness and recovery
7 device/roller that uses pressure and vibration to improve the body's overall
8 performance.

9 15. The Vyper Product is engineered to deliver high intensity and high
10 frequency vibration into the body in an effort to loosen and lengthen muscles,
11 thereby increasing the use range of motion and flexibility.

12 16. LF maintains that Hyperice is infringing at least claim 1 of the '437
13 patent by making, using, offering for sale, or selling in the United States, and/or
14 importing into the United States the VYPER without authorization from LF.

15 17. LF has made the foregoing assertion in two separate written
16 communications, one dated October 24, 2014, and another dated December 5, 2014.
17 True and correct copies of that correspondence are attached hereto as Exhibit C and
18 Exhibit D, respectively.

19 18. The '437 patent was issued to Hitzmann from U.S. Patent Application
20 No. 12/363,543, which was filed on December 11, 2009. Application No.
21 12/363,543 was a continuation of U.S. Patent Application No. 11/729,083, which
22 was filed on March 26, 2007. The first application was abandoned after being
23 rejected three times. The second application continued the prosecution of the first
24 application.

25 19. Claim 1 of the '437 patent recites (1) "a roller having an outer surface
26 that is configured to exert a force on a bodypart of a user when the bodypart is in
27 contact with the roller"; (2) "the roller being positionable to extend along a user's
28 spine;" and (3) "a vibration mechanism received entirely within an inner bore of the

1 roller, the vibration mechanism being configured to generate vibrations for acting
2 upon the bodypart of the user.”

3 20. The remaining clause of claim 1 beginning with “wherein” describes
4 the uses and effects of the rollers but does not define the structure of the roller.

5 21. On information and belief, the limitation “positionable to extend along a
6 user’s spine” was added during prosecution and cited by the examiner as a reason
7 for allowing the claims. Nothing in either the specification or drawings
8 accompanying the ‘437 patent identify any particular feature that makes it
9 particularly suitable to be positioned to extend along the user’s spine.

10 22. Hyperice is informed and believes, and thereon alleges, that the
11 cylindrical shape of the roller does not distinguish it from other cylindrical rollers
12 shown in the prior art, regardless of whether that roller has a vibrating mechanism,
13 as claimed in the ‘437 patent.

14 23. Vibrating rollers are shown in earlier patents and published patent
15 applications. However, at the time the examiner allowed claim 1, the prior art cited
16 by the applicant did not include United States Patent No. 5,554,102 (issued to
17 Chiou) and United States Patent Application Publication No. 2003/0131414 (issued
18 to Lee). A true and correct copy of the Chiou patent is attached hereto as Exhibit E.
19 A true and correct copy of the Lee published application is attached hereto as
20 Exhibit F.

21 24. Hitzmann identified the Chiou patent and the Lee publication in an
22 Information Disclosure Statement filed on December 12, 2012. However, Hyperice
23 is informed and believes, and thereon alleges, that this Information Disclosure
24 Statement was submitted too late to be considered by the examiner.

25 25. The Chiou patent discloses a portable massaging device with a
26 cylindrical body in which a power unit is fitted. The power unit includes a motor
27 [31] with a cam [33] that causes eccentric motion. In particular, the cam [33] is
28 actuated by the motor [31] “to rotate eccentrically so as to bring about a vibrational

1 motion, which is transmitted to the massaging set [40] in contact with a use[r]'s (*sic*)
 2 body portion intended to be massaged.” Although the Chiou patent shows a handle
 3 [50], the handle is removable. The Chiou massaging device can readily be
 4 positioned to extend along a user’s spine with or without the removable handle.

5 26. The Lee published application discloses a roller that can be positioned
 6 to extend along a user’s spine and that has internal driving motors to apply
 7 vibrations to the body of a user for relieving fatigue.

8 27. Based on the foregoing, Hyperice asserts that LF does not have a basis
 9 for asserting that the Vyper Product infringes a valid claim of the ‘437 patent,
 10 particularly when claim 1 is considered in view of the Chiou patent and the Lee
 11 publication.

12 28. Nonetheless, on October 24, 2015, counsel for LF sent Hyperice a letter
 13 communicating LF's position that it owned the Patent-in-Suit, and that the Vyper
 14 Product infringed that patent. LF's letter stated that Hyperice must either take a
 15 license from LF or be subjected to a patent enforcement action. See Exhibit C,
 16 *supra*.

17 29. On or about November 4, 2014, Hyperice responded to the foregoing
 18 with a letter in which Hyperice identified the Chiou patent and the Lee publication,
 19 and asked LF to explain how LF’s product avoided this prior art.

20 30. LF responded with a letter dated December 5, 2014, and stated, “As
 21 you know, the claims of the ‘437 patent are presumed by statute to be valid
 22 Therefore, we do not see the need to address the disclosures of the identified
 23 references at this time.” That letter implies that absent a license, LF will proceed to
 24 file suit. See Exhibit D, *supra*.

25 31. By virtue of the foregoing, a substantial controversy exists between the
 26 parties that is of sufficient immediacy and reality to warrant declaratory relief.

27 ///

28 ///

1 V. FIRST CLAIM FOR RELIEF

2 (DECLARATORY JUDGMENT OF NON-INFRINGEMENT ('437 PATENT))

3 32. Hyperice realleges and incorporates herein the allegations of the
4 preceding paragraphs of this Complaint as if fully set forth herein.

5 33. As a result of the acts described in the foregoing paragraphs, there
6 exists a substantial controversy of sufficient immediacy and reality to warrant the
7 issuance of a declaratory judgment.

8 34. A judicial declaration is necessary and appropriate so that Hyperice
9 may ascertain its rights regarding the '437 patent.

10 35. Hyperice is entitled to a declaratory judgment that it has not infringed
11 and does not infringe, directly or indirectly, any valid and enforceable claim of the
12 '437 patent.

13 VI. SECOND CLAIM FOR RELIEF

14 (Declaratory Judgment of Invalidity)

15 36. Hyperice hereby incorporates by reference each of the preceding
16 allegations above as through expressly stated herein.

17 37. Hyperice contends that one or more claims of the '437 patent is invalid
18 for failing to comply with the conditions and requirements for patentability set forth
19 in the United States Patent Laws, Title 35 U.S.C., including specifically §§ 102,
20 103, and/or 112, and the rules, regulations, and laws pertaining thereto.

21 38. Hyperice is therefore entitled to entry of judgment pursuant to 28
22 U.S.C. §§ 2201 and 2202 declaring one or more of the claims of the '437 patent
23 invalid.

24 VII. PRAYER FOR RELIEF

25 WHEREFORE, Hyperice prays for a declaratory judgment against LF:

26 1. Declaring that the claims of U.S. Patent No. 8,337,437 are invalid, or at
27 the very least that Claim 1 of U.S. Patent No. 8,337,437 is invalid;

28 2. Declaring that Hyperice has not infringed, either directly or indirectly,

1 any valid and enforceable claim of U.S. Patent No. 8,337,437;

2 3. Finding that this case is exceptional within the meaning of 35 U.S.C. §
3 285 and all other statutes, and therefore awarding to Hyperice its reasonable
4 attorneys' fees, costs, expenses, disbursements and costs incurred in this action; and

5 4. Granting such other and further relief to Hyperice as the Court may
6 deem just and proper.

7

8 DATED: January 13, 2015

JONATHAN S. PINK

JON E. HOKANSON

THOMAS S. KIDDÉ

TRAVIS LI

LEWIS BRISBOIS BISGAARD & SMITH LLP

10

11

12

13

By: 

14

Jonathan S. Pink

15

Attorneys for Plaintiff HYPERICE, INC. a
California Corporation

16

17

18

19

20

21

22

23

24

25

26

27

28

Jury Demand

Hyperice demands a trial by jury in this matter for all applicable issues.

DATED: January 13, 2015

JONATHAN S. PINK

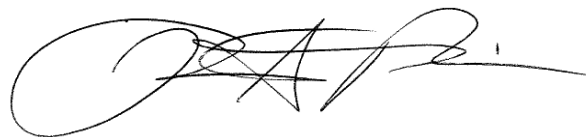
JON E. HOKANSON

THOMAS S. KIDDÉ

TRAVIS LI

LEWIS BRISBOIS BISGAARD & SMITH LLP

By: _____



Jonathan S. Pink

Attorneys for Plaintiff HYPERICE, INC. a
California Corporation